Supreme Court
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No. 98-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

REBECCA J. BROWN, ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT NATIONSBANK OF GEORGIA, N.A. IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondent NationsBank of Georgia, N.A. changed its name to NationsBank N.A. South in December 1995 and merged into NationsBank N.A. in June 1997. NationsBank N.A. is a wholly-owned subsidiary of N.B. Holdings Corporation which in turn is a wholly owned subsidiary of Bank America Corporation. NationsBank N.A. has no nonwholly-owned subsidiaries.

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STATEMENT

Plaintiff seeks review of an unpublished, per curiam decision of the Fifth Circuit, which found that her claims for money damages against trustees of an employee stock plan were defective as a matter of law under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. Each of the court of appeals' fact-bound decisions, resting on settled legal principles previously accepted by this Court, does not warrant further review. Plaintiff's claims in some instances are foreclosed by the terms of ERISA, in other instances attempt to overrule existing precedent from this Court, and in one instance was not even raised below. And while plaintiff today claims that the questions presented are of national import, she apparently did not feel that way at the Fifth Circuit. There, she agreed to waive oral argument. Surely it is the rare claimant that can successively persuade a court of appeals not to hold oral argument in an action, then convince this Court to grant review of the same issues. This petition, we respectfully submit, does not meet that steep challenge.

A. Facts

Petitioner Rebecca Brown was an employee of Wyatt Cafeterias, Inc., a company that operated food services in the Southwest, for 17 years. From January 1, 1988 to January 1, 1996, Brown was a beneficiary of the Wyatt Cafeteria Employee Stock Ownership Plan (the "employee stock plan" or "plan").

The employee stock plan was established in accordance with the general requirements of ERISA, 29 U.S.C. § 1001 *et seq.*, and with the specific requirements of an "employee pension benefit plan" under ERISA, 29 U.S.C. § 1002(2). Wyatt Cafeterias sponsored the plan, which held stock in the company for the benefit of Brown and other employees. Because the plan was non-contributory in nature, Wyatt employees could not make contributions to it. The company instead made all

contributions to the plan, and employees were allocated Wyatt stock based on the size of the company's contributions and based on the size of the employees' relative salaries. A summary description of the plan alerted employees that because "the primary purpose of [the plan] is to purchase Wyatt Cafeterias' stock, gains and losses in your account will primarily be caused by fluctuations in the value of Wyatt stock."

Respondent NationsBank of Georgia, N.A. served as a trustee of the employee stock plan during part of the plan's eight-year existence. And so did its successor trustee, respondent John Litzler. Under the terms of the plan, the trustees were ERISA fiduciaries. *See* 29 U.S.C. § 1102(a)(2).

In the years following the creation of the Wyatt employee stock plan, the company's stock dropped markedly in value. By 1995, the stock had become worthless, leaving the plan with no assets. On December 31, 1995, in accordance with a Chapter 11 plan of reorganization commenced by Wyatt's successor, the plan was formally terminated. No termination distributions were made from the plan because by that time the company's stock had no value.

B. Procedural History

On August 9, 1996, plaintiff filed an action on behalf of herself and other beneficiaries of the plan. She alleged that the trustees had committed common law fraud and breached their fiduciary duties as trustees of the employee stock plan, by among other things causing her to remain a Wyatt employee without making alternative retirement plans. Appendix to Petition for Writ of Certiorari ("Pet. App.") 16a. Initially filed in Texas state court, the action was later removed to federal court because plaintiff sought money damages for actions of the trustees in their capacities as ERISA fiduciaries.

On October 22, 1996, the trustees filed a motion to dismiss or in the alternative for summary judgment on the grounds that plaintiff's common law fraud claim was preempted by ERISA. The district court (Fish, J.) granted the motion. Even accepting plaintiff's allegations as true, the court held that they would not entitle her to compensatory or punitive damages under ERISA because "[a] private litigant may not recover individual compensatory or punitive damages under § 1132(a)(2). Rather, the individual claimant must recover on behalf of the plan," not on behalf of herself. Pet. App. 16a (citations omitted). Accordingly, the court dismissed plaintiff's claims for compensatory and punitive damages as a matter of law.

At the same time, the district court recognized that ERISA permitted awards to individuals of "appropriate equitable relief" in limited circumstances. Pet. App. 16a (citing 29 U.S.C. § 1132(a)(3)). The court therefore reserved final decision on the trustees' dispositive motion and directed the parties to submit further briefs on the question whether Brown was eligible for equitable relief on her own behalf if she established that the trustees breached their fiduciary duties under ERISA. Pet. App. 3a, 17a. The trustees promptly filed a second brief, contending that the equitable claims also should be dismissed as a matter of law. Instead of responding to this brief and following the court's directive, plaintiff filed a motion for leave to amend her complaint, and before the court could rule on her motion she proceeded to file the amended complaint. Pet. App. 3a. After the deadline to respond to the trustees' brief had passed and after plaintiff had "chosen not to avail herself of the opportunity to respond" (Pet. App. 9a), the district court granted the trustees' motion for summary judgment.

In an unpublished opinion, the court concluded that plaintiff's claim, even accounting for the amended complaint, did not establish a cognizable basis for equitable relief under

ERISA. Pet. App. 10a. Noting that plaintiff had merely "recast[ ]" her legal claims for money damages into equitable-sounding claims for money damages, the court found that the amended claim was simply "an awkward and futile attempt to cloak an obvious claim for damages in the language of equity." *Id.* By whatever name, the court reasoned, plaintiff's request for "mandatory injunctive relief to enjoin Defendants to make good the value of the [employee stock plan]" is still "a claim at law." *Id.* In the alternative, the court concluded that "even if Brown's request for a constructive trust stated a claim in equity," she had "failed to provide evidence of a fact issue regarding unjust enrichment, an essential element of the claim." Pet. App. 10a-11a.

On October 6, 1998, the Fifth Circuit (Davis, Duhe, Parker) affirmed in a per curiam, unpublished opinion. The court of appeals did not hear oral argument in the case, and plaintiff specifically stated in her appellate brief "that the decisional process would not be significantly aided by oral argument." Brief for Appellant Rebecca J. Brown, at iii. The appellate court first agreed with the district court that plaintiff had "simply tried to re-characterize an obvious claim for damages in the language of equity," and therefore could not evade the ERISA restrictions against legal relief on that ground alone. Pet. App. 4a. The court next concluded that legal damages were not available on plaintiff's claim, both because there was "no longer a plan for which Brown would be able to recover 'on behalf of,' under ERISA § 409(a)" (*id.*), and because at any rate "monetary damages" are "not available under ERISA § 502(a)'s carefully crafted civil enforcement provisions"(*id.*). Lastly the court rejected plaintiff's contention that she was improperly denied an opportunity to amend her complaint. In the court of appeals' view, the lower court did in fact consider — and reject — plaintiff's amended claims, so that "it would serve no valid purpose to allow Brown another attempt in vain

to further cloak her original damages claims in the language of equity." Pet. App. 5a.

REASONS FOR DENYING THE WRIT

In her petition, plaintiff raises three questions. The first two are related and challenge the Fifth Circuit's conclusion that the absence of an ERISA plan prevented plaintiff from bringing a claim as a beneficiary "on behalf of" a plan, ultimately contending that the case should never have been removed from State to federal court. Plaintiff next argues that the Fifth Circuit erred in alternatively concluding that she could not obtain monetary damages under ERISA's civil enforcement provisions.

In attacking these components of the lower court decision, plaintiff attempts to address each of the customary explanations for granting the writ under Rule 10, but in the end falls well short of satisfying a single one of them. The decision represents an application of well-settled law to the unique facts of this case, and fails either to implicate a conflict of authority in the lower courts or to raise an issue of law that has been decided differently by this Court. The petition should be denied.

A. Plaintiff Has Waived Her Challenge To The Removal Order, And At Any Rate The Order Does Not Conflict With Precedent From This Court Or The Lower Courts.

Plaintiff starts (Pet. 5-6) by arguing that the district court erred in removing the case to federal court when there was no longer an existing ERISA plan, then suggests that the removal decision somehow conflicts with other lower-court decisions. Neither claim is correct, and each fails to justify further review of this decision.

In the first place, there is no court of appeals decision to review on this point. Plaintiff never raised any such argument at the Fifth Circuit and accordingly the court never had any reason to consider it. The argument, in short, has been waived and for that reason alone does not warrant further review.

In the second place, the argument misapprehends established law. Principally relying on two cases from the Eleventh Circuit, *see Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325 (11th Cir. 1998), and *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*), plaintiff suggests (Pet. 5-6) that because there was no "existing plan" under ERISA at the time of removal, the federal court lacked jurisdiction to review her claims. The cited cases, however, address the very different situation in which claims were raised *before* an ERISA plan was ever established. In that setting, precedent properly forecloses jurisdiction for this sensible reason: As "no ERISA plan existed at the time of removal" and none had yet been formed, it is inappropriate to use a "subsequently adopted ERISA plan" to establish jurisdiction retroactively. *Whitt*, 147 F.3d at 1333. *See also Dillingham*, 688 F.2d at 1373, 1375 (finding that jurisdiction existed because the plan was not a prospect, but "a reality," at the time of removal). Yet that problem, and these cases, do not govern jurisdictional claims raised *after* an ERISA plan has been terminated and do not address claims that seek to assess liability for actions that occurred during the existence of the plan. The latter situation is of course the one presented here, and simply is not controlled by these correctly reasoned, yet inapposite, decisions.

Nor does plaintiff advance her cause by briefly citing (Pet. 6) two other cases ostensibly for this point. The Seventh Circuit's decision in *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509, 510 (7th Cir. 1993), is not even remotely connected to this issue. It dealt with a claim for restitution, and said nothing at all about jurisdiction or the need

for a plan. And the district court's unpublished decision in *Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, No. 93 C 2740, 1993 U.S. Dist. LEXIS 11262 (N.D. Ill. Aug. 12, 1993), is equally inapt. As a later decision by the same court in the same case confirms, this matter also concerned a claim that a plan "either never went into effect or was terminated shortly after it went into effect." *See Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, No. 93 C 2740, 1994 U.S. Dist. LEXIS 18446, at *10 (N.D. Ill. Dec. 15, 1994). In the final analysis, plaintiff has not shown one district court, to say nothing of a circuit court, that would decide the removal issue differently from the Fifth Circuit, even if the lower courts had in fact been presented with the issue.

B. No Conflict Of Authority Exists.

Plaintiff next attempts (Pet. 6-9) to manufacture a conflict of authority regarding the issues the Fifth Circuit did decide, namely that relief must be denied (1) because plaintiff no longer was a beneficiary of an existing plan at the time her claim was brought and (2) because monetary damages at any rate are not available for a claim on behalf of an individual as opposed to a plan. The cases on which plaintiff relies do not live up to their billing, and in the end no conflict emerges.

To start with, none of the cited cases discusses these general issues, and none addresses the unusual claim raised here—that plaintiff deserves (Pet. 9) "monetary damages, monetary equitable relief or monetary remedial relief" because the trustees of the stock employee plan somehow caused her to remain a Wyatt employee without making alternative retirement plans. Several of the cases, for example, merely involve beneficiaries of a failed plan who brought claims, though neither the courts nor the parties addressed whether the claims had to be brought on behalf of an existing plan. *See, e.g., Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 605 (8th Cir.

1995) (holding that decline in value of company stock held by an ERISA plan was "a loss to the Plan under ERISA 409(a)"); *Mertens v. Black*, 948 F.2d 1105, 1106 (9th Cir. 1991) (holding that decision concerning prior action on behalf of plan did not establish issue or claim preclusion regarding later action on behalf of plan) (per curiam). *Roth*, in point of fact, confirms the propriety of the legal framework that the Fifth Circuit applied. As here, *Roth* agreed that relief under section 409(a) was appropriate only when the plaintiff could show that the "loss is 'to the plan,'" as opposed "merely to the beneficiaries." 61 F.3d at 602.

Other cases simply establish the standard of care a fiduciary owes a plan, *see Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1404 (9th Cir. 1995), or more generally concern the rules regarding ERISA preemption, *see California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997). They thus do not remotely address the issues contested before the Fifth Circuit.

Still another case, *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir.), *cert. denied*, 516 U.S. 914 (1995), confirms the validity of the Fifth Circuit's decision rather than undermining it. As a general rule, *Kayes* indicates, individuals in plaintiff's position cannot "sue on behalf of [a] terminated plan." *Id.* at 1454. The decision, to be sure, does proceed to acknowledge that by statutory amendment, *see* 29 U.S.C. § 1132(a)(9), a different rule applies to former beneficiaries who claim a fiduciary breach has occurred in the narrow confines of a purchase of insurance contracts in connection with their termination as plan participants. *See id.* at 51 F.3d at 1455. That principle, however, has no application here.

And one case is mentioned not for the majority decision, but for a concurring and dissenting opinion. *See Fink v. National Savings and Trust Co.*, 772 F.2d 951, 961 (D.C. Cir. 1985)

(Scalia, J., concurring in part and dissenting in part). Even this separate writing, however, goes only to an application of law, not to a new legal principle.

Nor, lastly, does *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), help plaintiff. It again proves the rule on which the Fifth Circuit relied, and indeed was addressed by the court of appeals. In accordance with the plain language of section 409(a) of ERISA, 29 U.S.C. § 1109(a), *Russell* held that extra-contractual or punitive damages are not available to a beneficiary of an ERISA plan. A similar conclusion applies here.

In the end, plaintiff has failed to identify one case, from this Court or any other, under which her claims would have been decided differently. Contrary to her suggestion, then, the petition simply does not implicate a split in the lower courts.

C. The Decision Is Correct On The Merits.

Unable to establish a division in the lower courts, plaintiff next attempts to argue (Pet. 9-11) that the decision should nonetheless be reviewed because it was wrongly decided. This, too, is mistaken.

Plaintiff filed this claim under section 409(a) of ERISA, 29 U.S.C. § 1109(a). The carefully-crafted provision sets forth a comprehensive civil enforcement scheme that balances the need for fair claims procedures against the public interest in encouraging the formation of employee benefit plans. Under the provision, trustees of an ERISA plan who breach their fiduciary duties:

> [1] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, [2] and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and [3] shall be subject to such other equitable or

> remedial relief as the court may deem appropriate, including removal of such fiduciary.

Plaintiff's claim for money damages simply does not fit within any of these three exclusive categories.

In contending that the trustees caused her to remain a Wyatt employee without making alternative retirement plans (Pet. App. 16a), plaintiff clearly is not making a claim for "losses to the plan," making a claim "to restore" any profits "to such plan," or in any other way making a claim on behalf of the plan. By its terms, the claim is one for money damages brought on plaintiff's behalf, and thus is not a claim recognized by the statute. Both the district court and the Fifth Circuit thus correctly recognized that individual claimants cannot advance claims for fiduciary breach on behalf of themselves, but only on behalf of the plan. That conclusion is compelled by the terms of the statute, *see* 29 U.S.C. § 1109(a), and by precedent from this Court. *See, e.g.*, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 144.

Nor can plaintiff end-run this restriction by recharacterizing her claim as one for equitable relief. As she candidly admits (Pet. 9), she still wants monetary relief, whether in her words you call it "monetary damages, monetary equitable relief or monetary remedial relief." This Court, most notably, has previously rejected the suggestion that section 409(a)'s provision for equitable relief can be contorted to allow for money damages, a point duly noted by the Fifth Circuit in its decision below. *See* Pet. App. 4a ("'Equitable relief' under ERISA includes 'those categories of relief which were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages'") (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)). The Fifth Circuit, like the district court before it, properly rejected this claim as a matter of law.

D. The Lower-Court Decision Represents An Application Of Settled Law And Does Not Raise Questions Of National Importance.

Even aside from the absence of disagreement on the issues presented and even aside from the soundness of the Fifth Circuit's decision, the petition should be denied for still another reason. The case simply does not raise the kinds of pressing national issues that customarily warrant the Court's attention. From beginning to end, the petition represents at most a challenge to the application of several settled legal principles.

In trying to argue to the contrary, plaintiff contends (Pet. 11) that the case warrants the Court's attention due to "the proliferation of business mergers and acquisitions, and attendant business failures" causing "hundreds of thousands of employees" to be "subject to dislocation." No doubt these are important concerns. But they have little to do with this case, and in point of fact offer little reason why *every* ERISA case, as opposed to this one in particular, should not warrant review.

Nor does plaintiff improve her position by contending (Pet. 12) that the Court's ERISA "decisions have not been as effective and definitive as the Court could have wanted them to be." That aggressive suggestion, however, counsels against freely granting review in this area, not in favor of accepting such review, for it confirms the wisdom of reviewing only those ERISA issues that have had ample time to percolate in the lower courts. This simply is not one of those issues.

Plaintiff next suggests (Pet. 12-13) that the case is important because the Court has failed to appreciate that the "[c]ongressional intent" of ERISA "was for exclusive federal *regulation* of employee benefit plans, so that only state laws *regulating* employee benefit plans are to be preempted." Again, however, in arguing that ERISA should not preempt State law fraud claims like those preempted here, plaintiff is to

be sure technically raising an important federal question. But, again, it does not warrant review. Plaintiff's attack on the Court's construction of the "relating to" language of ERISA preemption was not raised below, was not addressed by the Fifth Circuit, and thus has now been waived. Accordingly, the issue could not even be addressed by the Court in the event the petition were granted. Indeed, in the petition for rehearing, plaintiff directly distinguished a case relied upon by the Fifth Circuit in these words: That "decision is about ERISA preemption, which has not been an issue in this appeal." Petition for Rehearing of Appellant Rebecca J. Brown, at 5. Perhaps most importantly, this broad claim is broadly undermined by existing Court precedent. *See California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 334; *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Ultimately, plaintiff's core disagreement with the Fifth Circuit goes not to a dispute over legal principles but to a dispute over the correct application of the law to the unique facts presented by this record. But that dispute falls well short of meeting Rule 10's bookend warnings that a petition is "rarely granted" when the alleged error consists of (1) "erroneous factual findings" or (2) "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This unexceptional decision, we respectfully submit, simply is not one of those "rare" cases.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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